

Draft
Proposed DVBE Regulations – 2005
California Code of Regulations

Title 2. Administration
Division 2. Financial Operations
Chapter 3. Department of General Services
Subchapter 10.5. Disabled Veteran Business Enterprise Participation
Goal Program for State Contracts

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Article 1. General Provisions

§ 1896.60. Purpose of Subchapter

The purpose of this subchapter is to set forth the rules for participation in the Disabled Veteran Business Enterprise (DVBE) program, and the roles, responsibilities and rights of businesses and the State as they pertain to DVBE certification.

NOTE

Authority: Sections 14600, 14615, Government Code; Sections 999 (a), 999.5 (d), Military and Veteran's Code.

Reference: Sections 999, 999.2, 999.5, 999.6, 999.7 and 999.9, Military and Veteran's Code and Section 10115.9, Public Contract Code

HISTORY

1. New; corresponds to organization of revised SB Regulations, 2004

§ 1896.61. Authority

- (a) The Department shall have the sole responsibility for determining the eligibility of and certifying DVBEs pursuant to the provisions of Article 6 of Chapter 6 of Division 4, Military and Veteran's Code, commencing with Section 999 and Article 1.5 of Chapter 1, Part 2 of Division 2, Public Contract Code Section 10115.9.
- (b) When authorized by the applicant, the Department may share certification data and information with other federal, state or local agencies for purposes of enabling the

applicant to become certified as a DVBE with these other public agencies.

NOTE

Authority: Sections 14837(e), 14839 and 14843, Government Code, Section 999.5, Military and Veterans Code,

Reference: Sections 14837 (e) and 14839, Government Code, Section 10115.9, Public Contract Code

HISTORY

1. New. Corresponds to Subchapter 8, Sect. 1896.2, SB Regulations, 2004

§ 1896.62. Definitions

The terms defined in this article shall have the following meanings whenever they appear in this subchapter:

- (a) **Administering agency** means the Treasurer in the case of contracts for professional bond services, and the Department of General Services' Office of Small Business (SB) and Disabled Veteran Business Enterprise (DVBE) Services, in the case of contracts governed by Section 999.2 of the Military and Veterans Code.
- (b) **ALJ** means Administrative Law Judge, as defined in Government Code Section 11502, assigned by the Office of Administrative Hearings to consider and rule on appeals of revocation, and sanctions.
- (c) **Awarding department** means any state agency, department, governmental entity, or other officer or entity empowered by law to issue bonds or enter into contracts on behalf of the State of California.
- (d) **Bidder** means an individual or entity that submits a final bid, quotation, proposal, price information or other response to a solicitation, regardless of the form used.
- (e) **Bonds** mean bonds, notes, warrants, certificates of participation, and other evidences of indebtedness issued by or on behalf of the State of California.
- (f) **Broker** or **Agent** means any individual or entity, or any combination thereof, that does not have title, possession, control, and risk of loss of materials, supplies, services, or equipment provided to an awarding department unless one or more certified disabled veterans has 51

percent (51%) ownership of the quantity and value of the materials, supplies, services and of each piece of equipment provided under the contract.

(g) **Certification denial** means the business is not approved as a DVBE for State of California contracting and will not receive the benefits of this designation.

(h) **Certification revocation** means that a business that is currently certified as a DVBE will have its certification removed for any of the following reasons:

- (1) Failure to respond to a notice issued by the OSDS within 30 calendar days.
- (2) Request by DVBE to voluntarily withdraw their current certification.
- (3) Filing by DVBE of a notice of failure to maintain business that meets the Military and Veterans Code requirements for a DVBE.
- (4) Violation of Military and Veterans Code Section 999.9(a).

(i) **Commercially useful function (CUF)** means a contractor, subcontractor or supplier that furnishes goods or services that contribute to the fulfillment of the contract requirements and that does all of the following as determined in Section 1896.82 of these regulations:

- (1) Is responsible for the execution of a distinct element of the work of the contract;
- (2) Carries out the contractual obligation by actually performing, managing, or supervising the work involved;
- (3) Performs work that is normal for its business services and functions;
- (4) Is not further subcontracting a portion of the work that is greater than that expected to be subcontracted by normal industry practices; and
- (5) Role is not limited to that of an extra participant in the transaction, contract or project through which funds are passed in order to obtain the appearance of DVBE participation.

(j) **Complete Federal tax return** includes all forms, schedules, and attachments as filed with the Internal Revenue Service.

(k) **Contract** includes any agreement or joint agreement to provide professional bond services to the State of California or an awarding department. "Contract" also includes any agreement or

joint development agreement to provide labor, services, materials, supplies or equipment in the performance of a contract, franchise, concession or lease granted, let or awarded for and on behalf of the State of California, including contracts for information technology. It does not include agreements such as those executed for subvention aid or local assistance contracts including those contracts providing assistance to local governments and aid to the public directly or through an intermediary, such as a non-profit corporation organized for that purpose; agreements with other governmental entities; and agreements with workshops serving individuals with disabilities (as described in Welfare and Institutions Code Section 19404, et seq).

- (l) **Contractor** means any person or persons, regardless of race, creed, national origin, ancestry, sex, marital status, disability, religious or political affiliation, or age, or any sole proprietorship, firm, partnership, joint venture, corporation, or combination thereof who submits a bid and enters into a contract with a representative of a state agency, department, governmental entity, or other officer empowered by law to enter into contracts on behalf of the State of California. "Contractor" includes any provider of professional bond services who enters in to a contract with an awarding department.
- (m) **Control** as applied to "ownership (or management) and control" of DVBE means the DVBE owner(s) and/or DVBE manager(s) must demonstrate expertise specifically in the firm's field of operation in controlling the overall destiny and the day-to-day operations of the firm. Office management, clerical, or other experience unrelated to the firm's field of operations is insufficient to establish control. This control is comprised of two parts -- Managerial and Operational.
- (1) To have managerial control, the DVBE owner(s) and/or DVBE manager(s) must demonstrate responsibility for the critical areas of the firm's operations. The DVBE owner(s) and/or DVBE manager(s) must be personally responsible for at least one of the following:

- (A) Negotiations, execution and signature of contracts; or
- (B) Execution (signature) of financial (credit, banking, bonding) transactions and agreements.

(2) To have operational control, the DV owner(s) and/or DV manager(s) must demonstrate that he/she independently makes basic decisions in daily operations. Absentee or titular ownership by the qualifying DV owner(s) and/or DVBE manager(s) will be deemed not to be in operational control. The DV owner/manager must include an active role in controlling the business.

Control may be demonstrated in various ways such as:

- (A) DVBE owner(s) and/or DVBE manager(s) have the ability to appoint or elect and to remove the majority of the Board of Directors;
- (B) No formal or informal restrictions exist to limit voting power or control of the DVBE owner(s) and/or DVBE manager(s);
- (C) No third party agreements restrict control by DVBE owner(s) and/or DVBE manager(s);
- (D) DVBE owner(s) and/or DVBE manager(s) possess the requisite experience, education, knowledge and qualifications in the firm's field of operations;
- (E) Salary/profits of DVBE owner(s) and/or DVBE manager(s) are commensurate with their ownership interest;
- (F) DVBE owner(s) receive at least 51% of any dividends paid by the firm including distribution upon liquidation; and
- (G) DVBE owner(s) are entitled to 100% of the value of each share of stock they hold if sold.
- (H) DVBE owner(s) and/or DVBE manager(s) control the operation of the firm in the following areas:
 - (i) Financial
 - (ii) Bonding

- (iii) Supervision - direct responsibility for subordinates
- (iv) Work force - direct responsibility for subordinates or subcontractors
- (v) Equipment
- (vi) Materials
- (vii) Facilities (office/yard)

(n) **Department** or **DGS** means the Department of General Services.

(o) **Disabled Veteran or DV** means a veteran of the military, naval or air service of the United States, including, but not limited to, the Philippine Commonwealth Army, the Regular Scouts ("Old Scouts"), and the Special Philippine Scouts ("New Scouts"), who has at least a ten percent (10%) service-connected disability recognized by the United States Department of Veterans Affairs or United States Department of Defense and who is domiciled in the State of California; may also refer to the qualifying DV owner or manager of a certified DVBE firm.

(p) **Disabled Veteran Business Enterprise (DVBE)** means a business certified by the administering agency as meeting all of the following requirements:

- (1) It is a sole proprietorship, or a partnership with at least 51 percent (51%) owned by one or more disabled veterans or, in the case of a publicly owned business, at least 51 percent (51%) of its stock is owned by one or more disabled veterans; a subsidiary which is wholly owned by a parent corporation, but only if at least 51 percent (51%) of the voting stock of the parent corporation is owned by one or more disabled veterans; or a joint venture in which at least 51 percent (51%) of the joint venture's management and control and earnings are held by one or more disabled veterans.
- (2) The management and control of the daily business operations are by one or more disabled veterans. The disabled veterans who exercise management and control are not required to be the same disabled veterans as the owners of the business.
- (3) It is a sole proprietorship, corporation, or partnership with its home office located in the United States, which is not a branch or subsidiary of a foreign corporation, foreign firm

or other foreign-based business.

(4) As an exemption to the prior requirements, a business shall be deemed to be a DVBE when the following situations exist:

- (A) The death or the certification of a permanent medical disability of a disabled veteran.
- (B) The disabled veteran in (A) prior to either event was a majority owner of a business that qualified as a disabled veteran business enterprise.
- (C) The business after the death or certification of permanent disability of the majority owner is inherited or controlled by the spouse or child of the majority owner or both of those persons.
- (D) The certification is solely for purposes of any contract entered into before the death or certification.
- (E) The identification as a DVBE will not exceed three years after the date of death or certification of permanent medical disability.

(q) Disabled Veteran Business Enterprise (DVBE) contractor, subcontractor or supplier

means any person or entity that has been certified by the administering agency pursuant to Military and Veterans Code Section 999 et seq. and that performs a commercially useful function as previously defined, in providing services or goods that contribute to the fulfillment of the contract requirements.

(r) Disabled Veteran Business Enterprise Goal means at least the statutory 3% goal of the annual agency's contracting expenditure is with DVBE firms.

(s) Disabled Veteran Business Enterprise (DVBE) Trade and Focus Papers means

publications that meet all of the criteria of Sections 1896.62 (bb) and (hh) of these regulations.

(t) Disabled Veteran Owner means a disabled veteran that has an ownership interest in a DVBE.

(u) Equipment broker means any prime contractor, subcontractor or supplier who rents or provides equipment to an awarding department. Pursuant to Military and Veterans Code

Section 999.2(c), a DVBE that rents equipment to an awarding department either directly or as a subcontractor to another firm bidding to the State, shall be deemed to be an equipment broker unless one or more disabled veterans has at least 51 percent (51%) ownership of the quantity and the value of each piece of equipment. Pursuant to Military and Veterans Code Section 999.2(c), a DVBE or a disabled veteran owner who fails to submit his or her tax returns as required will be deemed to be an equipment broker.

(v) **Equipment rental** includes any piece of equipment that is leased, rented, or provided for use with or without payment under contract or subcontract to any state agency, department, officer or other state governmental entity, including equipment for which operators are provided. It does not include the purchase of goods.

(w) **Frivolous** means an appeal with any or all of the following characteristics:

- (1) It is wholly without merit.
- (2) It is insufficient on its face.
- (3) The appellant has not submitted a rational argument based upon the evidence or law, which support the appeal.
- (4) The appeal is based upon ground other than those specified Section 1896.95 of this regulation.

(x) **Foreign corporation, foreign firm and foreign-based business** means a business entity that is incorporated or has its principal headquarters located outside the United States of America.

(y) **Certified Joint Venture** means an association of two or more DVBE businesses established by written agreement to engage in and carry out a single business venture for joint profit, for which purpose they combine their efforts, property, money, skills and/or knowledge. Certified joint ventures must be certified on a bid-by-bid basis. A non-certified firm(s) that forms a joint venture with another firm (whether certified or not) may bid jointly without being a “certified joint venture” within the meaning of Section 1896.70 (d) of these regulations.

However only a certified joint venture is entitled to the benefits of the DVBE program.

(z) **OAH** means the Department of General Services, Office of Administrative Hearing.

(aa) **OSDS** is the Office of Small Business and DVBE Services within the Department of General Services, Procurement Division. OSDS is charged with oversight and administration of the DVBE Participation Program in accordance with Military and Veterans Code Section 999 (a) and Public Contract Code Section 10115.4.

(bb) **Papers focusing on disabled veteran business enterprises** used in Section 10115.2(b)(3) of the Public Contract Code or focus papers means any publication that meets all of the following criteria:

- (1) Orientation relates to disabled veteran business enterprise(s).
- (2) Known and used by members of the disabled veteran business enterprise community.
- (3) Primarily offers articles, editorials (if any), and advertisements of business opportunities aimed at disabled veteran business enterprises.
- (4) Available within the geographic area for which the advertisement is placed and for which the services are to be performed.

(cc) **Professional bond services** include services as financial advisers, bond counsel, underwriters in negotiated transactions, underwriter's counsel, financial printers, feasibility consultants, and other professional services related to the issuance and sale of bonds.

(dd) **Sanction** means suspension or imposition of civil fines.

(ee) **Suspension** means the business will be barred for a period from bidding on or participating as a contractor, subcontractor, or supplier in any state contract. The suspension applies to the principals of the business and any subsequent business formed or financed by or affiliated with those principals.

(ff) **Solicitation** means the notification to prospective bidders that an awarding department wishes to receive bids for furnishing goods, services, information technology, or construction.

(gg) **Statutory Disability** as it is used in this Subchapter means a service-connected disability enumerated under Title 38, United States Code, Section 1114.

(hh) **Trade paper** used in Section 10115.2(b)(3) of the Public Contract Code means a publication that meets all of the following criteria:

- (1) Business orientation relates to the trade or industry for which the advertisement is being placed.
- (2) Known and used by members of that trade or industry.
- (3) Primarily offers articles, editorials (if any), and advertisements of business opportunities aimed at that trade or industry.
- (4) Available within the geographic area for which the advertisement is placed and for which the services are to be performed.

NOTE

Authority cited: Sections 14600 and 14615, Government Code; Sections 2052, 10115.3(b) and 10295, Public Contract Code; Section 999.5(d), Military and Veterans Code.

Reference: Sections 10115, 10115.1, 10115.2, 10115.3, 10115.5 and 10295, Public Contract Code; and Section 999, Military and Veterans Code; and *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1997), rehearing denied, ___ F.3d ___ (March 9, 1998).

HISTORY

1. New section filed 4-16-90; operative 5-16-90 (Register 90, No. 18).
2. New subsection (e) filed 12-16-91 as an emergency; operative 12-16-91 (Register 92, No. 13). A Certificate of Compliance must be transmitted to OAL 4-14-92 or emergency language will be repealed by operation of law on the following day.
3. Certificate of Compliance as to 12-16-92 order including amendment of Note and subsection (e)(2) transmitted to OAL 4-10-92 and filed 5-22-92 (Register 92, No. 22).
4. Amendment of section and Note filed 11-4-93 as an emergency; operative 11-4-93 (Register 93, No. 45). A Certificate of Compliance must be transmitted to OAL by 3-7-94 or emergency language will be repealed by operation of law on the following day.
5. Amendment of section and Note refiled 2-23-94 as an emergency; operative 2-23-94 (Register 94, No. 8). A Certificate of Compliance must be transmitted to OAL by 6-23-94 or emergency language will be repealed by operation of law on the following day.
6. Certificate of Compliance as to 2-23-94 order transmitted to OAL 6-23-94 with amendment of text and Note and filed 8-5-94 (Register 94, No. 31).
7. Editorial correction amending subsection (e) (Register 94, No. 39).
8. Change without regulatory effect amending section and Note filed 4-30-98 pursuant to section 100, title 1, California Code of Regulations (Register 98, No. 20).
9. Revised and renumbered from former §1896.61
10. Revised in 2005 based on changes resulting from AB 669 and SB 1008. Formerly section 1896.61. Added or modified 20 definitions, section 999.5 (b), Military and Veterans Code reference amended to section 999.5 (d) throughout this regulation to reflect administering agency's authority to adopt rules and regulations.

Article 2. DVBE Participation in State Contracting

§1896.70. Disabled Veteran Business Enterprise (DVBE) Participation Goals

- (a) The DVBE participation program goal established in Public Contract Code Section 10115(c) applies to the overall annual expenditures of the awarding department for contracts as defined by Section 1896.62 (k) of these regulations.
- (b) The director of the awarding department may establish a participation goal either less than or in excess of the statutory goal of 3 percent DVBE(s) for a specific solicitation, project or contract as long as the overall goal of 3 percent DVBE(s) is satisfied as defined by Section 10115(c) of the Public Contract Code. In establishing the goal, it is helpful to review the OSDS database of DVBE firms to determine the number of qualified DVBE firms in the needed business field and location(s). Where the number of certified DVBE firms exceeds 3%, the awarding department is encouraged to set a higher goal for the solicitation.
- (c) To qualify as a responsive bidder for contracts awarded as the result of a solicitation process when DVBE participation goal is specified, in addition to meeting all other technical and/or administrative requirements specified in the solicitation, a bidder must document in the bidder's response to the solicitation, at or prior to the time of bid opening, that the bidder made a commitment to fulfill the participation goal, or made a good faith effort to meet the participation goal.
- (d) Except as may be changed by subsection (b), the requirement for satisfying the participation goal shall be deemed to have been met if a bidder:
 - (1) Is a DVBE and is committed to perform not less than 3 percent of the dollar amount of the bid with its own forces, or in combination with those of other DVBEs; or
 - (2) Is a non-DVBE and is committed to use DVBE(s) for not less than 3 percent of the dollar amount of the bid response.

- (e) The awarding department shall find that the DVBE joint venture has met the requirements for the participation goal providing the DVBE joint venture satisfies all of the following conditions:
- (1) A bidder uses the DVBE status of the bidder's joint venture partner(s) to meet the participation goal; and
 - (2) Each DVBE joint venture partner used to satisfy the participation goal also satisfies the 51% ownership and/or control requirements for status as a DVBE as an independent enterprise outside the joint venture; and
 - (3) Each DVBE joint venture partner is responsible for a clearly defined portion of the work, identified both as a task and as a percentage share/dollar amount of the overall project/response to the solicitation. The goal attainment claimed in the response to the solicitation cannot exceed the percentage share of the work to be performed by each DVBE partner as claimed in the joint venture agreement.
 - (4) If the DVBE joint venture bidder/contractor is unable to satisfy the goal of 3 percent DVBE, using any one of its joint venture partners, the DVBE joint venture bidder/contractor will satisfy the goal as prescribed in subsection (d). If unable to satisfy the goal the DVBE joint venture bidder/contractor will conduct a good faith effort as prescribed in Section 1896.71 of these regulations.
- (f) The bidder's authorized representative shall:
- (1) List the name of each DVBE firm proposed for use in the performance of the contract;
 - (2) List the percentage share/dollar amount of the overall contract to be performed by each DVBE; and
 - (3) Describe the task to be performed by such DVBE.

NOTE

Authority cited: Sections 14600 and 14615, Government Code; and Sections 10115.3(b) and 10295, Public Contract Code; and Section 999.5(d), Military and Veterans Code.
Reference: Sections 10115 and 10115.2, Public Contract Code; and Section 999(g) and (i), Military and Veterans Code; and *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1997), rehearing denied, ___ F.3d ___ (March 9, 1998).

HISTORY

1. New section filed 4-16-90; operative 5-16-90 (Register 90, No. 18).
2. Amendment of section heading, text and Note filed 11-4-93 as an emergency; operative 11-4-93 (Register 93, No. 45). A Certificate of Compliance must be transmitted to OAL by 3-7-94 or emergency language will be repealed by operation of law on the following day.
3. Amendment of section heading, text and Note refiled 2-23-94 as an emergency; operative 2-23-94 (Register 94, No. 8). A Certificate of Compliance must be transmitted to OAL by 6-23-94 or emergency language will be repealed by operation of law on the following day.
4. Editorial correction designating subsection (g) (Register 94, No. 8).
5. Certificate of Compliance as to 2-23-94 order transmitted to OAL 6-23-94 with amendment of text and Note and filed 8-5-94 (Register 94, No. 31).
6. Change without regulatory effect amending section and Note filed 4-30-98 pursuant to section 100, title 1, California Code of Regulations (Register 98, No. 20).
7. Former section 1896.62 renumbered 2005; added reference to OSDs' database and encourages higher DVBE goal where feasible.

§1896. 71. Good Faith Effort¹

- (a) Bidders must satisfy the good faith effort requirement (unless goal is met) at the time of bid opening. Bidders are encouraged to use all avenues to hire disabled veteran business enterprises and consider documentation of these aspects of a good faith effort process primarily where there is a lack of DVBE firms.
- (b) If the participation goal is not met, the bidder shall comply with the requirements of Public Contract Code Section 10115.2(b)(1) through (5) including (3) unless the advertising requirements of that subsection are waived in the solicitation document by the awarding department. The awarding department shall require documentation of that compliance in the solicitation document. The bidder shall submit documentation of that compliance with the bid.
- (c) The awarding department shall evaluate the effort made by the bidder to seek out and consider disabled veteran business enterprises as potential subcontractors for services, materials, labor, supplies or equipment, including information technology services, supplies, and equipment.
- (d) In evaluating such effort, the awarding department shall require written evidence that the bidder completed the actions specified in Public Contract Code Section 10115.2(b)(1), (2), (4), and (5). Unless the awarding department waived the advertising requirement, the written

¹ SB 320 (Machado) may cause this section to be deleted or revised, and other changes to be developed.

evidence must also include advertising as specified in Section 10115.2(b)(3).

(e) Based on this evaluation, the awarding department, in its sole discretion, may find that the bidder has met the good faith effort requirement.

(f) Unless it waives the good faith effort advertising requirements of Section 10115.2(b)(3) of the Public Contract Code, the awarding department shall require that:

(1) Bidders must advertise in trade papers and disabled veteran business enterprise trade and focus papers, as specified in the solicitation. Trade papers and disabled veteran business enterprise trade and focus papers as defined in Section 1896.62 must be acceptable to the awarding department.

(2) Unless otherwise specified in the solicitation document, bidders must publish advertisements in trade papers and DVBE trade and focus papers at least 14 calendar days prior to the due date of the response to the solicitation. (Awarding departments may either waive the advertising requirement or establish an advertising period of less than 14 calendar days in the solicitation document if time limits do not permit a 14-day advertising period.)

(3) Solicitation documents must contain one of the following:

(A) The OSDC Resource Packet for DVBE trade and focus papers; or

(B) A list of DVBE trade and focus papers specific to the business of the awarding department; or

(C) The following paragraph:

In accordance with Public Contract Code Section 10115.2(b)(3), bidders must advertise in DVBE trade and focus publications unless the DVBE goal is satisfied. The OSDS publishes a list of trade papers to assist bidders in meeting these contract requirements. To obtain this list, please contact the OSDS and request the "Resource Packet." The OSDS may be contacted at:

(Awarding department to list current address and telephone number of OSDS.)

NOTE

Authority cited: Sections 14600 and 14615, Government Code; and Sections 10115.3(b) and 10295, Public Contract Code, and Section 999.5(a) (d), Military and Veterans Code.
Reference: Sections 10115 and 10115.2, Public Contract Code; and Section 999.5(d), Military and Veterans Code; and *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1997), rehearing denied, ___ F.3d ____ (March 9, 1998).

HISTORY

1. New section filed 4-16-90; operative 5-16-90 (Register 90, No. 18).
2. Amendment of section and Note filed 11-4-93 as an emergency; operative 11-4-93 (Register 93, No. 45). A Certificate of Compliance must be transmitted to OAL by 3-7-94 or emergency language will be repealed by operation of law on the following day.
3. Amendment of section and Note refiled 2-23-94 as an emergency; operative 2-23-94 (Register 94, No. 8). A Certificate of Compliance must be transmitted to OAL by 6-23-94 or emergency language will be repealed by operation of law on the following day.
4. Certificate of Compliance as to 2-23-94 order transmitted to OAL 6-23-94 with amendment of subsection (a), new subsection (b) and subsection redesignation, and amendment of subsections (d)(1) and (d)(3)(C)) filed 8-5-94 (Register 94, No. 31).
5. Change without regulatory effect amending section and Note filed 4-30-98 pursuant to section 100, title 1, California Code of Regulations (Register 98, No. 20).
6. Former section 1896.63, renumbered and office title updated in 2005; use of defined terms for "trade and focus papers" standardized; encourages hire of DVBE over "good faith effort"; specifies that reduction of ad time period will be in the solicitation document.

§1896.72. Contract Awards

- (a) If a bidder fails to meet the "good faith effort" requirement of Section 1896.71 of this regulation, such bidder shall be deemed not to be a responsive bidder for purposes of an awarding department's evaluation of an award of contract and is thus ineligible for an award. No provision of these regulations, however, shall be deemed to require the awarding department to make an award.
- (b) With respect to invitations for bid for the purchase of supplies or equipment pursuant to the provisions of Article 3 of Chapter 2 of Part 2 of Division 2 of the Public Contract Code (commencing with Section 10301) or the acquisition of information technology (IT) goods and services pursuant to the provision of Chapter 3 of Part 2 of Division 2 of the Public Contract Code (commencing with Section 12100 or 12125) where the awarding department has reserved the right to make multiple awards or a single contract award, a bidder shall be deemed responsive regarding the requirement for the making of a good faith effort if there would be compliance with the provisions of Section 1896.71 of these regulations based on

award for a single contract, notwithstanding such bidder may be unable to achieve compliance to meet the established goal if the awarding department exercises the right to make multiple awards.

NOTE

Authority cited: Sections 14600 and 14615, Government Code; Sections 10115.3(b) and 10295, Public Contract Code; and Section 999.5(d), Military and Veterans Code.

Reference: Sections 10115.1 and 10115.2, Public Contract Code; and Sections 999(i) and 999.5(d), Military and Veterans Code; and *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1997), rehearing denied, ___ F.3d ___ (March 9, 1998).

HISTORY

1. New section filed 4-16-90; operative 5-16-90 (Register 90, No. 18).
2. New subsection (c) and amendment of Note filed 11-4-93 as an emergency; operative 11-4-93 (Register 93, No. 45). A Certificate of Compliance must be transmitted to OAL by 3-7-94 or emergency language will be repealed by operation of law on the following day.
3. New subsection (c) and amendment of Note refiled 2-23-94 as an emergency; operative 2-23-94 (Register 94, No. 8). A Certificate of Compliance must be transmitted to OAL by 6-23-94 or emergency language will be repealed by operation of law on the following day.
4. Certificate of Compliance as to 2-23-94 order transmitted to OAL 6-23-94 with amendment of subsection (b), repealer and new subsection (c)(1), and amendment of subsections (c)(1)(B)-(C) and Note filed 8-5-94 (Register 94, No. 31).
5. New subsection (d) and amendment of Note filed 8-5-94 as an emergency; operative 8-5-94 (Register 94, No. 31). A Certificate of Compliance must be transmitted to OAL by 12-3-94 or emergency language will be repealed by operation of law on the following day.
6. Editorial correction amending subsection (d)(7) (Register 94, No. 39).
7. Certificate of Compliance as to 8-5-94 order including amendment of subsection (d)(6) transmitted to OAL 11-4-94 and filed 12-20-94 (Register 94, No. 51).
8. Change without regulatory effect amending section and Note filed 4-30-98 pursuant to section 100, title 1, California Code of Regulations (Register 98, No. 20).
9. Renumbered from former section 1896.64, 2005. Subsection (c), Substitution of a DVBE, removed to create a new section, see below.

1896.73. Substitution of a DVBE

(a) After award of a contract, the successful bidder/contractor must use the DVBE

subcontractor(s) and/or supplier(s) proposed in the solicitation response to the State per Section 1896.70 of these regulations unless a substitution is requested. The bidder/contractor must request the substitution in writing to the awarding department and the awarding department must have approved the substitution in writing. At a minimum the substitution request must include:

- (1) A written explanation of the reason for the substitution; and if applicable, the contractor must also include the reason a non-DVBE subcontractor is proposed for use.

- (2) A written description of the business enterprise to be substituted, including its business status as a sole proprietorship, partnership, corporation or other entity, and the DVBE certification status of the firm, if any.
 - (3) A written notice detailing a clearly defined portion of the work identified both as a task and as a percentage share/dollar amount of the overall contract that the substituted firm will perform.
 - (4) A copy of written notice with proof of delivery to the original DVBE of intent to substitute and the reasons.
 - (5) If provided by the DVBE, consent or refusal for substitution.
- (b) The request for substitution of the DVBE subcontractor/supplier must be approved in writing by the awarding department prior to commencement of any work by the subcontractor/supplier.
- (c) The request for substitution of a DVBE and the awarding department's approval or disapproval cannot be used as an excuse for noncompliance with any other provision of law, including, but not limited to, the Subletting and Subcontracting Fair Practices Act (Sections 4100 et seq., Public Contract Code) or any other contract requirements relating to substitution of subcontractors.
- (d) Approval by awarding Department of Contractor's Request for DVBE Substitution.

If a contractor requests substitution of its DVBE subcontractor(s)/supplier(s) by providing a written request to the awarding department in accordance with this Section, the awarding department may consent to the substitution of another person as a subcontractor in any of the following situations:

- (1) When the subcontractor listed in the bid after having had a reasonable opportunity to do so fails or refuses to execute a written contract, when that written contract based upon the general terms, conditions, plans and specifications for the project involved or the terms of that subcontractor's written bid, is presented to the subcontractor by the prime contractor.

- (2) When the listed subcontractor becomes bankrupt or insolvent, or goes out of business.
 - (3) When the listed subcontractor fails or refuses to perform his or her subcontract.
 - (4) When the listed subcontractor fails or refuses to meet the bond requirements of the prime contractor.
 - (5) When the prime contractor demonstrated to the awarding department, or its duly authorized officer, that the incorrect name of the subcontractor was listed.
 - (6) When the listed subcontractor is not licensed pursuant to any applicable licensing requirement of any regulatory agency of the State of California.
 - (7) When the awarding department, or its duly authorized officer, determines that the work performed by the listed subcontractor is substantially unsatisfactory and not in substantial accordance with the plans and specifications, or that the subcontractor is substantially delaying or disrupting the process of the work.
- (e) Prior to approval of the prime contractor's request for the substitution, the awarding department, or its duly authorized officer, shall give notice in writing to the listed subcontractor of the prime contractor's request to substitute and of the reasons for the request. The notice shall be served by certified or registered mail to the last known address of the subcontractor. The listed subcontractor who has been so notified shall have five working days within which to submit written objections to the substitution to the awarding authority. Failure to file these written objections shall constitute the listed subcontractor's consent to the substitution. If written objections are filed, the awarding authority shall give notice in writing of at least five working days to the listed subcontractor of a hearing by the awarding department on the prime contractor's request for substitution.

NOTE

Authority cited: Sections 14600 and 14615, Government Code; Sections 10115.3(b) and 10295, Public Contract Code; and Section 999.5(d), Military and Veterans Code.
Reference: Sections 10115.1 and 10115.2, Public Contract Code; and Sections 999(i) and 999.5(d), Military and Veterans Code; and *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1997), rehearing denied, ___ F.3d ___ (March 9, 1998).

HISTORY

1. This section formerly 1896.64 (c); revised and renumbered in 2005; added two requirements to substitution requests; clarifies clerical error as incorrect name only.

§1896.74. Contract Approval

For purpose of Public Contract Code Section 10295, an awarding department shall demonstrate compliance with the part of Article 1.5 (commencing with Section 10115) of Chapter 1 of Part 2 of Division 2 of the Public Contract Code that concerns DVBEs and these regulations.

NOTE

Authority cited: Sections 14600 and 14615, Government Code; and Sections 10115.3(b) and 10295, Public Contract Code. Reference: Section 10295, Public Contract Code; and *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1997), rehearing denied, ___ F.3d ___ (March 9, 1998).

HISTORY

1. New section filed 4-16-90; operative 5-16-90 (Register 90, No. 18).
2. Amendment of subchapter heading filed 11-4-93 as an emergency; operative 11-4-93 (Register 93, No. 45). A Certificate of Compliance must be transmitted to OAL by 3-7-94 or emergency language will be repealed by operation of law on the following day.
3. Change without regulatory effect amending subchapter heading, section and Note filed 4-30-98 pursuant to section 100, title 1, California Code of Regulations (Register 98, No. 20).
4. Formerly section 1896.60 (2005). Section deleted and renumbered to correspond to organization of Subchapter 8.

§ 1896.75. Special Requirements for Contracts that include Leased, Rented, or Provided Equipment

(a) A bidder and any proposed DVBE contractor or subcontractor at any tier that will lease, rent, provide or use equipment in any proposed contract with the State shall submit the declarations required by Military and Veterans Code Section 999.2 on form STD. 843 (EST. 7/2004) with the solicitation response. The form shall be made available as part of the solicitation information (or incorporated by reference and available on a Web site).

The specific requirements of the declarations are as follows:

- (1) The declaration for the DVBE shall provide information required in Military and Veterans Code Section 999.2 (d) if the DVBE represents itself as a disabled veteran business meeting and maintaining all the requirements of the DVBE

program

- (2) The declaration for owner(s) of equipment shall provide the information required in Military and Veterans Code Section 999.2 (c)
- (3) The declaration for the DVBE that is a broker or agent and that obtains a contract or subcontract pursuant to Military and Veterans Code Section 999.2 (a) shall provide the information required in Military and Veterans Code Section 999.2 (f)

(b) The enterprise shall submit their complete business federal tax returns at the time of certification and annually thereafter with the Office of Small Business and DVBE Services (OSDS) or upon request by OSDS. If the DVBE firm is organized as a sole proprietor, the complete federal tax return shall be the owner's personal federal tax return.

(1) If equipment is owned by a DV other than the DVBE firm, the DVBE shall submit the complete individual federal tax return for each DV owner and for each DV manager to the OSDS as required by Military and Veterans Code Section 999.2(g) prior to any solicitation response for equipment rental.

(2) Failure to provide the federal tax returns shall be deemed a voluntary withdrawal from the disabled veteran business enterprise program and certification shall be terminated. Any bidder for which award may be pending shall be deemed non-responsive, non-responsible, and ineligible for award.

(c) Failure to provide the declaration and if applicable, the federal tax returns of the DV equipment owner(s) will result in the DVBE being deemed an equipment broker in accordance with Military and Veterans Code Section 999.2(c). Furthermore, the awarding agency may not count any contract or subcontract with an equipment broker toward participation goals.

(d) The determination that a DVBE is an equipment broker must be followed by a determination of whether the DVBE performs a CUF, as defined in Section 1896.82 of

these regulations.

- (e) A DVBE equipment broker shall not be considered for award under Government Code Sections 14838.5 and 14838.7. The awarding agency shall notify OSDs of any determination that a DVBE is an equipment broker or fails to perform a CUF.

NOTE

Authority cited: Sections 14600, 14615, Government Code; Sections 10115.3 (b), 10295, Public Contract Code; Sections 999.1, 999.2, Military & Veterans Code; Sections 14838.5, 14838.7, Government Code.

Reference: Sections 999.2 and 999.5, Military and Veterans Code

HISTORY

1. New section filed 2005; based on SB 1008 (Machado 2003.) Declarations and tax returns are a new requirement based on SB 1008; section added to clarify declarations and tax returns required to be submitted by contractors; defines failure to submit federal tax returns as voluntary withdrawal from DVBE program

§ 1896.76. Contact Modifications

After award of contract, the successful bidder/contractor and the awarding department may need to amend a contract for other than substitution of a DVBE. The contract should describe how modifications would be handled in relationship to maintaining as high DVBE participation as possible. If the modification of the contract is for additional work, the awarding agency should where possible maintain in the modification, at least the same percentage of DVBE participation as in the original contract.

NOTE

Authority cited: Sections 14600 and 14615, Government Code; Sections 10115.3(b) and 10295, Public Contract Code; and Section 999.5(d), Military and Veterans Code.

Reference: Sections 10115.1 and 10115.2, Public Contract Code; and Sections 999(i) and 999.5(b) (d), Military and Veterans Code.

HISTORY

New 2005

§1896.77. Contract Audits

When a department awards a contract subject to participation goals or good faith effort² in accordance with Public Contract Code Section 10115.2, it shall include a provision, which in

² SB 320 (Machado) may cause this section to be revised.

substance provides the following:

Contractor or vendor agrees that the awarding department or its delegatee will have the right to review, obtain, and copy all records pertaining to performance of the contract. Contractor or vendor agrees to provide the awarding department or its delegatee with any relevant information requested and shall permit the awarding department or its delegatee access to its premises, upon reasonable notice, during normal business hours for the purpose of interviewing employees and inspecting and copying such books, records, accounts, and other material that may be relevant to a matter under investigation for the purpose of determining compliance with Public Contract Code Section 10115 et seq. and Section 1896.60 et seq. of these regulations. Contractor or vendor further agrees to maintain such records for a period of three (3) years after final payment under the contract.

NOTE

Authority cited: Sections 14600 and 14615, Government Code; and Sections 10115.3(b) and 10295, Public Contract Code. Reference: Section 10115.3(a), Public Contract Code; and *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1997), rehearing denied, ___ F.3d ___ (March 9, 1998).

HISTORY

1. New section "Hiring Preference/Contract for Services" filed 4-22-91; operative 5-22-91 (Register 91, No. 20).
2. Renumbering of former section 1896.66 "Contract Audits" to section 1896.75 filed 11-4-93 as an emergency; operative 11-4-93 (Register 93, No. 45). A Certificate of Compliance must be transmitted to OAL by 3-7-94 or emergency language will be repealed by operation of law on the following day.
3. Change without regulatory effect renumbering former section 1896.75 "Hiring Preference/Contract for Services" to section 1896.105 filed 1-27-94 pursuant to title 1, section 100, California Code of Regulations (Register 94, No. 4).
4. Renumbering of former section 1896.66 "Contract Audits" to section 1896.75 refilled 2-23-94 as an emergency; operative 2-23-94 (Register 94, No. 8). A Certificate of Compliance must be transmitted to OAL by 6-23-94 or emergency language will be repealed by operation of law on the following day.
5. Editorial correction deleting section heading, Note and History for former section 1896.75 "Hiring Preference/Contract for Services" and amending History notes (Register 94, No. 14).
6. Certificate of Compliance as to 2-23-94 order transmitted to OAL 6-23-94 with amendment of first paragraph filed 8-5-94 (Register 94, No. 31).
7. Change without regulatory effect amending second paragraph and Note filed 4-30-98 pursuant to section 100, title 1, California Code of Regulations (Register 98, No. 20).
8. Former section 1896.75 renumbered 2005.

§1896.78. Reporting Participation Goals

- (a) Data reported by the awarding department as required by Section 10115.5 of the Public Contract Code and Section 999.7 of the Military and Veterans Code must be consistent with the regulations governing the award of the contracts. For contracts with a participation goal, the awards must be reported as claimed by the contractor per Section 1896.70(f) of these regulations. For contracts awarded without a participation goal, the awarding department may report each eligible firm represented in the contract. If it is unknown whether the firm is a certified DVBE, the award(s) must be reported as not qualified.
- (b) Awarding departments may not count contracts toward participation goals that were awarded to equipment brokers as defined in Section 1896.62(u) of these regulations and in accordance with Military and Veterans Code Sections 999.2(b)(3), 999.2(c) and 999.2(e).
- (c) Awarding departments may not count toward participation goals any contract funds awarded during any period in which a DVBE is not in compliance with Military and Veterans Code Section 999.2(g)(4) with respect to furnishing required declarations or federal tax returns as required by Military and Veterans Code Section 999.2 or failing to notify the State as required by Military and Veterans Code Section 999.2(h).
- (d) Awarding departments may not count toward participation goals any state funds expended with a DVBE that does not meet and maintain the certification requirements as required by Military and Veterans Code Section 999.5(b).
- (e) DVBE contractors for professional bond services are required to provide a report to the State upon conclusion of the sale of the bonds as required by Military and Veterans Code Section 999.5(a).

NOTE

Authority cited: Sections 14600 and 14615, Government Code; Section 10115.3(b), Public Contract Code; and Section 999.5(d), Military and Veterans Code.

Reference: Section 10115.5, Public Contract Code; and Section 999.7, Military and Veterans Code; and *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1997), rehearing denied, ____ F.3d ____ (March 9, 1998).

HISTORY

1. Repealer and new section filed 11-4-93 as an emergency; operative 11-4-93 (Register 93, No. 45). A Certificate of Compliance.

2. Repealer and new section refiled 2-23-94 as an emergency; operative 2-23-94 (Register 94, No. 8). A Certificate of Compliance must be transmitted to OAL by 6-23-94 or emergency language will be repealed by operation of law on the following day.
3. Certificate of Compliance as to 2-23-94 order transmitted to OAL 6-23-94 including repealer and new section and amendment of Note filed 8-5-94 (Register 94, No. 31).
4. Editorial correction amending History 3 (Register 94, No. 40).
5. Change without regulatory effect amending section and Note filed 4-30-98 pursuant to section 100, title 1, California Code of Regulations (Register 98, No. 20). Must be transmitted to OAL by 3-7-94 or emergency language will be repealed by operation of law on the following day
6. Renumbered from former section 1896.90, 2005 for subsection (a); remainder new based on AB 669 and SB 1008 (2003).

Article 3. DVBE Certification

§1896.80. Forms

The Office of Small Business and DVBE Services (OSDS) shall use the following form for determining certifiable disabled veteran business enterprises: Disabled Veteran Business Enterprise Certification Application, STD. 812 (Rev. 1/2002).

STD. 812 concerns disabled veteran business enterprise and pertains to Sections 1896.60 to 1896.93 of these regulations and are made a part of this regulation (Section 1896.80, Title 2, California Code of Regulations).

NOTE

Authority cited: Sections 14600 and 14615, Government Code; Section 999.5(d), Military and Veterans Code; and 10115.3, Public Contract Code.

Reference: Section 10115.3, Public Contract Code; and Section 999.5(d), Military and Veterans Code; and *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1997), rehearing denied, ___ F.3d ___ (March 9, 1998).

HISTORY

1. Repealed and new section filed 11-4-93 as an emergency; operative 11-4-93 (Register 93, No. 45). A Certificate of Compliance must be transmitted to OAL by 3-7-94 or emergency language will be repealed by operation of law on the following day. For prior history, see Register 91, No. 24.
2. Repealed and new section refiled 2-23-94 as an emergency; operative 2-23-94 (Register 94, No. 8). A Certificate of Compliance must be transmitted to OAL by 6-23-94 or emergency language will be repealed by operation of law on the following day.
3. Certificate of Compliance as to 2-23-94 order transmitted to OAL 6-23-94 with amendment of subsection (a) and filed 8-5-94 (Register 94, No. 31).
4. Amendment of subsection (b) and Note filed 8-5-94 as an emergency; operative 8-5-94 (Register 94, No. 31). A Certificate of Compliance must be transmitted to OAL by 12-3-94 or emergency language will be repealed by operation of law on the following day.
5. Editorial correction amending subsection (a) (Register 94, No. 39).
6. Certificate of Compliance as to 8-5-94 order transmitted to OAL 11-4-94 and filed 12-20-94 (Register 94, No. 51).
7. Change without regulatory effect amending subsection (b) filed 8-1-97 pursuant to section 100, title 1, California Code of Regulations (Register 97, No. 31).

8. Change without regulatory effect repealing subsection (a) and subsection (b) designator and amending Note filed 4-30-98 pursuant to section 100, title 1, California Code of Regulations (Register 98, No. 20).
9. Former section 1896.95 renumbered 2005; revised title of DGS Office per AB 669 (Cohn); updated STD. 812 information.

§1896.81. Eligibility for Certification as a DVBE

In order to obtain DVBE certification under this Subchapter, a business concern must meet all of the following:

- (a) Meet DVBE requirements set forth in this Subchapter and Article 6 (commencing with Section 999) of Chapter 6, Division 4 of the California Military and Veterans Code.
- (b) Provide the following documentation to the Office of Small Business and DVBE Services (OSDS), no later than five o'clock p.m. (5:00 p.m.) of the bid due date, unless the regulations (Section 1896 et seq., Title 2, California Code of Regulations) implementing the Small Business Procurement and Contract Act (SBPCA) specify a different time, in which case the submission time for application as identified in the SBPCA shall prevail:
 - (1) A completed Disabled Veteran Business Enterprise Certification Application, STD. 812 (Rev. 1/2002) (as required by Section 1896.80 which is made a part of this regulation);
 - (2) A copy of an Award of Entitlement letter from the United States Department of Veterans Affairs or United States Department of Defense that was issued within six (6) months of the date a new certification is sought and which certifies or declares the existence of a service-connected disability of at least 10 percent.
 - (3) Support documents as specified by the OSDS, including federal income tax returns as required by Military and Veterans Code Section 999.2 (g).
- (c) In the case of renewal of a DVBE certification, the applicant(s) shall certify in writing that there has been no change in the status of applicant's service-connected disability. In the event that an applicant is seeking certification on the basis of a service-connected Statutory Disability, subsequent renewal of the certification will require that the applicant certify in writing that there has been no change in the status of the service-connected disability.

- (d) In reviewing an applicant for, or the validity of a DVBE certification, the OSDC may
- (1) Require the DVBE applicant to submit additional documents and information that support eligibility to be a certified DVBE.
 - (2) Consider whatever information is provided to it from records gathered or held by any California state or local agency, any governmental agency of another state, or the federal government; or is available from any public site.
- (e) Corporations that are not currently authorized to do business in the State of California by the Secretary of State are not eligible for certification.

NOTE

Authority cited: Sections 14600 and 14615, Government Code; Section 999.5(d), Military and Veterans Code, and Sections 10115.3(b) and 10295, Public Contract Code.

Reference: Sections 10115.1 and 10115.9, Public Contract Code; and Section 999(g), Military Veterans Code, and Section 23101, Revenue and Taxation Code.

HISTORY

1. New section "Definitions" filed 4-22-91; operative 5-22-91 (Register 91, No. 20).
2. New section "DVBE Certification" filed 11-4-93 as an emergency; operative 11-4-93 (Register 93, No. 45). A Certificate of Compliance must be transmitted to OAL by 3-7-94 or emergency language will be repealed by operation of law on the following day.
3. Change without regulatory effect renumbering former section 1896.70 "Definitions" to section 1896.100 filed 1-27-94 pursuant to title 1, section 100, California Code of Regulations (Register 94, No. 4).
4. Editorial correction restoring inadvertently deleted section "DVBE Certification" (Register 94, No. 5).
5. New section "DVBE Certification" refiled 2-23-94 as an emergency; operative 2-23-94 (Register 94, No. 8). A Certificate of Compliance must be transmitted to OAL by 6-23-94 or emergency language will be repealed by operation of law on the following day.
6. Editorial correction deleting section heading, Note and History for former section 1896.70 "Definitions" and amending History notes (Register 94, No. 14).
7. Certificate of Compliance as to 2-23-94 order transmitted to OAL 6-23-94 with repealer of subchapter and article headings and amendment of subsections (b)-(b)(1) filed 8-5-94 (Register 94, No. 31).
8. Editorial correction amending subsection (b)(1) (Register 94, No. 39).
9. Formerly section 1896.70, renumbered 2005; re-named form; specified corporate documents must be provided to OSDS; clarified certification material may include information from other governmental agencies or public sites; added that entity must be able to do business in California

§1896.82. Determination of Commercially Useful Function (CUF)

Factors the OSDS and the bidding agency may take into consideration to determine if a contractor, subcontractor or supplier provides a CUF are as follows:

- (a) The contractor, subcontractor or supplier must provide an element of the work that is a basis for the purpose of the contract. It is not a new element for state business only, unless specifically requested by the State. It is not merely a pass-through that results in an offer of representation of “all things to all people.”
- (b) The contractor, subcontractor or supplier qualifies as a manufacturer that may be based on, but not limited to the following:
 - (A) Whether the business, with its own facilities, performs the primary activities in transforming inorganic or organic substances into the end item being acquired, and is not a packager or, in the case of kits, a final assembler. The end item must possess characteristics that, as a result of mechanical, chemical, or human action, it did not possess before the original substances, parts, or components were assembled or transformed. The end item may be finished and ready for utilization or consumption, or it may be semi-finished as a raw material to be used in additional manufacturing.
 - (B) The factors considered by the federal Small Business Administration pursuant to Title 13, Code of Federal Regulations (CFR), Chapter I, Part 121, Section 121.406(b)(2).
 - (C) Whether more than fifty percent (50%) of annual gross receipts, as determined by the Department, result from the manufacture and sale of products manufactured by the business.
- (c) The contractor, subcontractor or supplier possesses a contracting license and is acting within that licensing field in the contract.
- (d) The contractor, subcontractor, supplier, or state agency does not create a violation of Government Code Section 19130, especially in relationship to the public interest of having a particular function, such as purchasing, performed directly by state government.
- (e) The contractor, subcontractor or supplier does not represent five or more business fields as determined by the number of Standard Industrial Classification (SIC) system codes they identify as their business.

NOTE

Authority cited: Sections 999 & 999.5(a), 999.6, Military and Veterans Code, Sections 14837, 14839, 14843, Government Code.

Reference: Section 999(e) (2), Military and Veterans Code, Sections 14837, 19130, Government Code

HISTORY

1. New provision based upon 2004 AB 669 revision to the Military and Veterans Code

§1896.83. Certification by the Department

- (a) A business meeting the eligibility and certification requirements of Sections 1896.81 and 1896.82 of these regulations shall be certified as a DVBE business, and shall be accorded all rights and privileges due pursuant to that certification.
- (b) The Department may certify businesses that have been certified by or on behalf of another governmental organization that uses substantially the same or more stringent definitions as those set forth in Military and Veterans Code Section 999, and substantially the same or more stringent certification analysis process than used by the Department.
- (c) Certification will be valid for up to thirty-six (36) months. Prior to the end of a certification period, in its sole discretion, the Department may extend the certification period up to an additional twenty-four (24) months after certification eligibility re-verification or confirmation pursuant to Section 1896.81. The total period of certification, including extensions, shall not exceed sixty (60) months. At the end of a 60-month certification period, businesses may re-apply for certification. If eligible, a new certification period of up to 36 months, with extensions up to an additional 24 months, will begin.
- (d) In order to ensure uninterrupted DVBE certification, the business must provide a completed renewal application to OSDS thirty (30) calendar days before the certification lapses.
- (e) The application of a business that does not meet the eligibility requirements for certification as a DVBE, or does not respond to requests from the Department for additional information, will be denied certification.

- (f) If a DVBE is determined by the Department to no longer meet the eligibility requirements for DVBE certification, the certification shall be revoked.
- (g) If it is determined by the Department that a DVBE is not performing a commercially useful function on a contract it has been awarded by a state agency, or on a state contract that it is performing as a subcontractor, the certification may be revoked. If the Department determines that an applicant for certification does not perform a commercially useful function, certification will be denied.
- (h) The Department will notify the business in writing of its certification decision.

NOTE

Authority cited: Sections 999 & 999.5(a), 999.6, Military and Veterans Code, Sections 14837, 14839, 14843, Government Code.

Reference: Section 999, Military and Veterans Code, Section 14837, Government Code

HISTORY

1. New provision in 2005 based upon Small Business Regulations Section 1896.16, adds applicant not meeting commercially useful function will be denied certification; adds written notification of decision.

§1896.84. Change in Entity and Corporate Status

A certified DVBE firm that has changed its legal entity must notify the OSDS in writing of the change within 15 days of the change. It is unlawful for a firm that has changed its legal entity to continue to promote itself as a certified DVBE without first applying for and receiving certification approval as the new entity.

Corporations that are not currently authorized to do business in the State of California by the Secretary of State are not eligible for certification. If the Secretary of State suspends the corporate status of any certified firm or if the corporate status is forfeited, the certified firm shall provide written notice of suspension or forfeiture to the OSDS within 15 days of the date the Secretary of State mails the notice of suspension or forfeiture. The OSDS may revoke the certification of any firm if the Secretary of State does not reinstate the corporate status within 60 days of the notice of suspension or forfeiture.

NOTE

Authority cited: Sections 999 (a) & 999.5(a), 999.6, Military and Veterans Code, Sections 14600, 14615, 14837(e), 14843, Government Code.

Reference: Sections 23101, 23101.5, Revenue and Taxation Code

HISTORY

New Section 2005

§1896.85. Unlawful Certification and Contracting Activities

- (a) The Military and Veterans Code Section 999.9 defines unlawful activities for a business entity, principals in the business entity or any person aiding in obtaining DVBE certification or contracts or funds expended in a contract. It is also unlawful to willfully and knowingly fail to file any declaration or notice with the awarding agency that is required by Military and Veterans Code Section 999.2 and pertains to Section 1896.75 of this regulation.
- (b) The failure of, or refusal by a business entity, principal in the business entity or any person to cooperate in an investigation of a complaint against their firm is considered impeding a state official that is investigating the qualifications of a business entity that has requested DVBE certification.

NOTE

Authority cited: Sections 14600, 14615, Government Code; Sections 999, 999.5 (d) & 999.6, Military and Veterans Code.

Reference: Section 999.9, Military and Veterans Code, Section 14837, Government Code

HISTORY

1. New section 2005 based on SB 1008 (Cohn, Statutes of 2003).

Article 4. Enforcement and Sanctions

§ 1896.90. Enforcement

- (a) The administering agency shall be responsible for initiating administrative actions against firms deemed necessary for the enforcement of Military and Veterans Code Sections 999-999.13 and Public Contract Code Sections 10115, et seq., including referring matters to the Attorney General for prosecution, and imposition of civil/criminal sanctions.
- (b) In the event that the administering agency determines a firm does not meet eligibility

requirements for certification, the firm shall be so notified. OSDS may immediately indicate the status of the applicant firm as “denied” in their automated systems.

(c) In the event that the administering agency determines that a firm that has a current certification no longer meets eligibility requirements or has violated the provisions of Military and Veterans Code Section 999.9, as it may be amended, the administering agency shall so notify the firm and indicate the effective date of the revocation of certification and/or the imposition of other administrative sanctions including, but not limited to sanctions pursuant to Military and Veterans Code Sections 999.9 (b) and (c), or the Public Contract Code Section 10115.10. The affected certified firm, other firms or principals associated therewith may appeal this decision in accordance with these regulations.

(1) If no notice of appeal is received by OSDS within the time required, the OSDS may change the firm’s status in automated systems or implement sanctions without need for further notification. In the sole discretion of the Director, additional time to appeal may be granted if there are extenuating circumstances that prevented a timely appeal.

(2) If an appeal is received within the time indicated, it shall be forwarded to OSDS within one working day of receipt for processing of the appeal in accordance with the provisions herein and the requirements of the Military and Veterans Code, Sections 999-999.13 inclusive.

NOTE

Authority cited: Sections 14600, 14615, Government Code; Sections 999.5 (d), 999.9, Military and Veterans Code, Sections 10115.3 (b), 10295, Public Contract Code

Reference: Sections 999.9, Military and Veterans Code, Sections 10115-10115.15, Public Contract Code.

HISTORY

1. New provision in 2005 based on changes resulting from SB 1008 (Cohn, Statutes of 2003); PCC sections identified.

§ 1896.91. Investigations

Nothing in these regulations shall be construed to impair the right of the awarding department or the Department to initiate investigations available for the purpose of ensuring compliance with the requirements of Public Contract Code Section 10115, et seq. and Section 999 et seq. of the Military and Veterans Code and attendant rules and regulations.

NOTE

Authority cited: Sections 14600 and 14615, Government Code; and Sections 10115.3(b) and 10295, Public Contract Code; and Section 999.5(d), Military and Veterans Code.
Reference: Sections 10115.2, 10115.3(b), and 10115.10, Public Contract Code; and Section 999.9, Military and Veterans Code; and *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1997), rehearing denied, ___ F.3d ___ (March 9, 1998).

HISTORY

1. New section "Contract Provisions" filed 4-22-91; operative 5-22-91 (Register 91, No. 20).
2. Renumbering and amendment of former section 1896.67 "Adjudicatory and Investigatory Procedures" to section 1896.80 filed 11-4-93 as an emergency; operative 11-4-93 (Register 93, No. 45). A Certificate of Compliance must be transmitted to OAL by 3-7-94 or emergency language will be repealed by operation of law on the following day.
3. Change without regulatory effect renumbering former section 1896.80 "Contract Provisions" to section 1896.110 filed 1-27-94 pursuant to title 1, section 100, California Code of Regulations (Register 94, No. 4).
4. Renumbering and amendment of former section 1896.67 "Adjudicatory and Investigatory Procedures" to section 1896.80 refilled 2-23-94 as an emergency; operative 2-23-94 (Register 94, No. 8). A Certificate of Compliance must be transmitted to OAL by 6-23-94 or emergency language will be repealed by operation of law on the following day.
5. Editorial correction deleting section heading, Note and History for former section 1896.80 "Contract Provisions" and amending History notes (Register 94, No. 14).
6. Certificate of Compliance as to 2-23-94 order transmitted to OAL 6-23-94 with amendment of text and Note and filed 8-5-94 (Register 94, No. 31).
7. Change without regulatory effect amending first paragraph and Note filed 4-30-98 pursuant to section 100, title 1, California Code of Regulations (Register 98, No. 20).
8. Formerly 1896.80, Renumbered 2005; organization title updated to conform to M&V Section 999.6 (AB 669). Second paragraph of subsection removed to create new subsection, 1896.92 (c). "Adjudicatory or investigatory procedures" terms removed to better explain the process.

§ 1896.92. Sanctions and Reporting Requirements

- (a) The Department of General Services can impose any of the sanctions of Military and Veterans Code Sections 999-999.13, Public Contract Code Sections 10115 et seq. or other laws such as the False Claim Act, Government Code Sections 12650-12656. The sanctions may be imposed against individuals, including qualifying DVs, other owners and the DVBE entity as well as persons/firms associated with it or any person who violates the aforementioned laws.

- (b) The awarding department shall report all alleged violations of Military and Veterans Code Section 999.9 or Public Contract Code Sections 10115 et. seq., to the DGS, Office of Small Business and Disabled Veteran Business Enterprise Services (OSDS). The DGS shall subsequently report alleged violations that exceed the administrative authority of the DGS or alleged violations from complaining DVBE firms to the Attorney General who will determine whether to bring a civil action against any person or firm for the violation(s).
- (c) Prior to reporting an alleged violation of Military and Veteran Code Section 999.9 or Public Contract Code Section 10115.10 to the DGS, OSDS, the awarding departments shall investigate the alleged violation and shall prepare a written report of their findings. The written report shall also include a recommendation for action to be taken commensurate with the awarding department's findings. Whatever the results of the awarding departments' findings, they shall submit the entire information, documentation and written findings to the OSDS within 60 working days of the notification to the awarding department for investigation of the alleged violation.
- (d) The DGS may direct allegations it receives to the awarding department for investigation. The process, requirements and timetables are the same as for those allegations identified directly to the awarding departments in subsection (c). The Chief of the OSDS may grant an extension of the 60 working day requirement after receiving a written request and justification for the additional time. The extension may be granted at the sole discretion of the Chief. The awarding department will provide a point of contact for the DGS, usually the Procurement and Contract Officer, the head of Procurement, or the chief executive of smaller organizations.

NOTE

Authority cited: Sections 14600, 14615, 14842.5 (a) (d), Government Code; and Sections 10115.3(b), 10295, Public Contract Code; and Sections 999, 999.5, and 999.9, Military and Veterans Code.

Reference: Sections 10115.2, 10115.3(b), and 10115.10, Public Contract Code; and Section 999.9, Military and Veterans Code; and *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1997), rehearing denied, ___ F.3d ___ (March 9, 1998).

HISTORY

1. New provision in 2005 based on changes resulting from SB 1008 (Cohn, Statutes of 2003); adds mandate for departments to provide entire investigative materials; allows OSDS to provide extensions of time and direct investigations to departments. Subsection (c) formerly 1896.90, second paragraph.

Article 5. Appeal Process

§1896.95. Appeal of Certification Denial, Revocation, or Suspension

- (a) When denying an application for DVBE certification, revoking the certification of a DVBE, or suspending a DVBE from bidding on or being a contractor, subcontractor or consultant for state contracts, the Department will notify the DVBE, other firms and affected principals in writing. The notice shall include the reasons for the denial, revocation, or suspension, as applicable, and provide information regarding the process for appealing the decision(s).
- (b) All denials or revocations of certification for DVBE status by OSDS shall become final unless the DVBE appeals the determination within the time specified in the notification letter as described in Section 1896.86 (c) of these regulations, or if unspecified, within 30 calendar days of the date of receipt of the notification.
- (c) A business, having been denied certification as a DVBE, or having been provided written notice by the Department of its intention to revoke the DVBE certification of the business, or of its intention to suspend the DVBE from doing business with the State, may appeal the Department's determination.
- (d) An appeal shall be filed with the DGS administrative officer, appointed by the Director by the date and time specified by the DGS in its notice. The appeal shall be in writing, signed, dated and include a detailed written statement of the facts that support grounds for the appeal as required in subsection (e).
- (e) Grounds for appeal shall be:
 - (1) Denial: The applicant met the requirements of the Military and Veterans Code Sections 999 et seq. and should have been certified as a DVBE based upon the information contained in the application including, if applicable, supplemental material submitted

by the applicant or obtained by the Department from records held by any California State or local agency, any governmental agency of another state or the federal government or any publicly available information as of the date of the Department's notice of certification denial.

(2) Revocation: The business meets the requirements of the Military and Veterans Code Sections 999 et seq. and should remain certified as a DVBE based upon the information contained in the application, including, if applicable, supplemental material submitted by the applicant or obtained by the Department as of the date of the Department's notice of revocation determination.

(3) Suspensions or other sanctions should not be imposed, because one or more of the conditions set forth in Military and Veterans Code Section 999.9 or Public Contract Code Section 10115 .10, Government Code Sections 12651, 14842 or 14842.5, as applicable, did not exist.

(f) There are no grounds for appeal in any of the following situations:

(1) Failure to timely appeal a notice issued by the OSDS

(2) Failure or incomplete response within the time stated by OSDS of a written request for information

(3) Voluntary withdrawal of a pending application, or

(4) Withdrawal from the DVBE program

(g) In the event that the Department determines that the DVBE failed to state any grounds on which an appeal can be decided, or determines the appeal is frivolous, the Department shall notify the DVBE in writing of its decision. At any time the DGS finds that an appeal is clearly insufficient on its face, entirely without merit, or outside the jurisdiction of the DGS, the administrative officer may dismiss the appeal. The administrative officer's decision shall be final.

(h) When the DGS receives a timely appeal for denial of certification under this section, the

administrative officer shall resolve the appeal based on written materials. For revocation of certification or suspension, the administrative officer shall prepare materials and forward the appeal to the ALJ as found herein.

- (i) If the administrative officer is going to determine the appeal through written submissions, the administrative officer shall notify all interested parties. Each of the interested parties notified by the administrative officer may submit a written argument, which supports its position.

NOTE

Authority cited: Sections 999, 999.5 and 999.9, Military and Veterans Code; Sections 14600, 14615, 14837(e), 14839(g) and 14843, Government Code

Reference: Section 999.9, Military and Veterans Code; Sections 12651, 14842, 14842.5 (a) (d), Government Code; Section 10115.10, Public Contract Code.

HISTORY

1. New. Based upon Subchapter 8, Sect. 1896.18, SB Regulations, 2004 modified to use “revocation” in place of “decertification” to be consistent with the Military and Veterans Code and “suspension” as an additional sanction instead of the word “sanction”; clarifies those covered by regulation are DVBE contractors, subcontractors or consultants; administrative officer role is similar in regard to appeals for denial of certification found in former Section 1896.85.

§1896.96. Appeal Hearings

Appeal hearings shall be conducted in accordance with the Administrative Procedure Act, Chapter 5, Part 1 of Division 3, Title 2, Government Code, commencing with Section 11500, except as provided in this subchapter. Although a pre-hearing conference is encouraged for appeals of sanctions, it shall be the ALJ’s sole discretion as to whether to conduct a pre-hearing conference, hearing, or proceed with a decision based solely on the written material. If a hearing is held, the ALJ shall have discretion to limit the number of witnesses and the time allocated to each; authority to permit or limit cross-examination; and exclusive discretion to issue subpoenas and/or subpoena “duces tecum.” There shall be no right for the appellant to take depositions, issue interrogatories, or subpoena persons or documents. However, the appellant may request information through the California Public Records Act.

NOTE

Authority cited: Sections 999, 999.5 and 999.9, Military and Veterans Code; Sections 14600, 14615, 14837 and 14843, Government Code.

Reference: Sections 11500, 11501, 11502, 11503, 11504, 11504.5, 11505, 11506, 11507, 11507.3, 11507.5, 11507.6, 11507.7, 11508, 11509, 11511.5, 11511.7, 11512, 11513, 11514, 11515, 11516, 11517, 11518, 11518.5, 11519, 11520, 11521, 11523, 11524, 11526, 11527, 11528, and 14839 Government Code.

HISTORY

1. New 2005. Corresponds to Subchapter 8, Sect. 1896.20, SB Regulations, 2004

§1896.97. Appeal Decisions

- (a) For appeals of revocations, suspensions or other sanctions, the decision of the ALJ shall be an order to uphold or deny the appeal, and shall include the imposition of administrative sanctions pursuant to Military and Veterans Code Section 999.9, Public Contract Code Sections, and/or the False Claim Act as appropriate. If the ALJ upholds the appeal, the Department shall certify the business as a DVBE business pursuant to Section 1896.83 of these regulations.
- (b) For denials of certification, the decision of the administrative officer shall be to uphold or deny the appeal. If the administrative officer upholds the appeal, the Department shall certify the business as a DVBE business pursuant to Section 1896.83 of these regulations.

NOTE

Authority cited: Sections 14600, 14615, 14839, and 14843, Government Code, Sections 999(a), 999.5(d), Military and Veterans Code.

Reference: Section 999.9, Military and Veterans Code, Sections 11517, 14839, and 14841.5 Government Code.

HISTORY

New 2005, corresponds to Subchapter 8, Sect. 1896.22, SB Regulations, 2004, modifies denial of certification to correspond to OSDS methodology.